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STATE OF LOUISIANA

No. 39,793

SUPREME COURT OF LOUISIANA

BOARD OF LEVEE COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT,
Plaintiff-Appellee,

vs.

GEORGE B. FRANKLIN, SR. AND GEORGE B. FRANKLIN, JR.,
Defendants-Appellants

STATEMENT AS TO JURISDICTION

Now Into Court come George B. Franklin and George B. Franklin, Jr., appellants herein, and concurrently with the presentation of their petition for the allowance of an appeal from the Supreme Court of Louisiana to the Supreme Court of the United States, herewith and hereby present this statement disclosing the basis upon which the Supreme Court of the United States has jurisdiction upon such appeal to review the judgment and decree from which said appeal is taken.

The above-named appellants in support of the jurisdiction of the Supreme Court of the United States to review on appeal the above-entitled cause and the final decree of the Supreme Court of Louisiana granting the Tensas Basin Levee District's prayer for a permanent injunction against appellants, respectfully represent:

I. Statute Sustaining Jurisdiction

The statutory provision believed to sustain jurisdiction is Title 28, section 1257 United States Code, and particularly the following provisions thereof:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

II. The Louisiana Statutes, the Validity of Which Is Drawn in Question

The statutes of the State of Louisiana, the validity of which are drawn in question, are as follows, to-wit:

Art. 665 Revised Civil Code (1870) of Louisiana, p. 371 of Dart's, Second Edition.

Art. 16, Sec. 6 of the Louisiana Constitution of 1921, p. 340 of Dart's Constitutions of the State of Louisiana.

Louisiana Act 61 of 1904, Section one, p. 142 (L.R.S. 38:113).

Louisiana Act 66 of 1942, p. 202 (L.R.S. 38:281)

and particularly the interpretation placed on said civil codal article, statutes and constitutional provision by the Supreme Court of Louisiana as giving the various levee districts throughout the State of Louisiana a right of servitude or easement on all the lands in the State of Louisiana, regardless of where situated, which right of servitude or easement is accompanied by the right to "appropriate" without a hearing, without any notice and without just and adequate compensation all private property in the State of Louisiana. State constitutions are state laws, *Mississippi & Missouri R. R. Co.* v. *McClure,* 10 Wall (77 U. S.) 511, 19 L. Ed. 997, and under the federal constitution stand on the same footing as statutes.

III. Date of Final Judgment and Application for Appeal

The Supreme Court of Louisiana, the highest court in the State of Louisiana, entered Judgment granting the Board of Levee Commissioners of the Tensas Basin Levee District a permanent injunction against defendants-appellants on May 28, 1951. An application for rehearing on behalf of defendants, according to law, was timely filed by defendants, and on June 29, 1951, said Rehearing was denied by the Supreme Court of Louisiana, Mr. Justice Hawthorne of said Court Dissenting from Refusal to Grant a Rehearing and handing down written reasons. The application for appeal herein is presented on this the 27th day of July, A. D. 1951.

IV. Nature of the Case, Rulings of the Court, and Substantial Questions Involved

Defendants-appellants herein, George B. Franklin and George B. Franklin, Jr., are the owners of a certain tract

of land in Morehouse Parish (County), Louisiana, described as follows:

> All that part of Section 11, lying East of Bayou Boeuf. N-½ of S-½ of SW-¼ and N-½ of SE-¼ Section 12. N-½ of NE-¼ and SW-¼ of SE-¼ Section 13. All in Township 18 North, Range 5 East, containing in the aggregate 900.78 acres, more or less. *See deed filed in evidence as Defendants' Exhibit D-1, Transcript p. 220.*

This tract of land is used by defendants for the growing of hardwood timber, defendants being the owners of a large lumber mill and timber enterprise. This property is not situated on a navigable stream. Bayou Boeuf or Little Bayou Boeuf as it is sometimes called and Board Tree Slough are not navigable, being only slight depressions in the surrounding swampy area having a standing water depth of 12 to 18 inches. *See Transcript pp. 18-20.* The nearest navigable stream is Bayou Bartholomew which is approximately 17 miles distant from defendants' property. *See maps filed in evidence as Plaintiff Exhibit P-20 and Defendants Exhibit D-6, Transcript pp. 217 and 230.* The opinion of the Supreme Court of Louisiana concedes by its findings of fact and law that defendants' property is not situated on a navigable stream. *See also Dissent from Refusal to Grant a Rehearing by Justice Hawthorne.* In 1949 defendants were approached by the Board of Levee Commissioners of the Tensas Basin Levee District, a political sub-division of the State of Louisiana, specially created under Act No. 59 of the Louisiana Legislature of 1886, with the request that they execute a right of way for a drainage canal 40 feet wide at the top, 20 feet wide at the bottom and 6 feet across said property. *See Transcript p. 120.* This was refused. Later, said levee district passed a resolution setting forth its intention of using said prop-

erty for the construction of said drainage canal, filed a certified copy thereof in the Conveyance Records of the Parish (County) where said property is situated, and forwarded a certified copy thereof by Registered U. S. Mail to the owners, George B. Franklin and George B. Franklin, Jr. Thereby the Tensas Basin Levee District claims to have "appropriated" and acquired a right-of-way through defendants' property for said drainage canal. When work on this project was commenced by the contractor defendants were successful in stopping said operations without resorting to the courts. The Board of Levee Commissioners of the Tensas Basin Levee District then filed this suit to enjoin and restrain defendants from interfering with the work. On the trial of the case of Fourth District Court for the Parish of Morehouse, State of Louisiana, granted said Board of Commissioners a permanent injunction against defendants as prayed for.

In the petition (complaint) filed by the Board of Levee Commissioners of the Tensas Basin Levee District it is alleged that said drainage canal through a portion of defendants' property constitutes levee drainage. It was claimed that the construction of the levee on the left descending bank of Bayou Bartholomew, in the vicinity of Horse Bayou, (which is 17 miles distant from defendants' property), has created a serious levee drainage problem in that when the floodgates, at that point, are closed during periods of high water on Bayou Bartholomew, it is impossible for the waters on the land side of the levee on the East descending bank of Bayou Bartholomew to drain into said bayou. Therefore, it was claimed that the proposed drainage canal through defendants' property is necessary to divert or drain said waters off said levee when the floodgates on Bayou Bartholomew are closed. After setting up these facts, said Board of Levee Commissioners then alleged that pursuant to the provisions of Art. 16, sec.

6 of the Louisiana Constitution of 1921 and Art. 665 Revised Civil Code (1870) of Louisiana, which allegedly granted to the public a right of servitude or easement on said lands, it proceeded to appropriate the lands necessary for this project. This "appropriation" was conducted in the manner hereinabove set forth by simply passing said resolution, filing a copy of same in the Conveyance Records, and sending a copy to the landowners. In addition to said right of servitude, the Board of Levee Commissioners claimed in its petition, under Louisiana Act No. 61 of 1904 (L. R. S. 38:113), control over all natural drainage channels within the limits of its district and for a space of One Hundred (100) feet on each side thereof. It is then alleged that Little Bayou Boeuf and Board Tree Slough, which pass through defendants' property, are public or natural drainage channels, and that the drainage channel is confined to the channels of said streams, (neither of which are navigable), or within a space of One Hundred (100) feet on each side thereof. Art. 665 Revised Civil Code (1870) of Louisiana, Art. 16, sec. 6 of the Louisiana Constitution of 1921, Louisiana Act 61 of 1904 (L. R. S. 38:113), and Louisiana Act 66 of 1942 (L. R. S. 38:281) reads as follows, to-wit:

> *Art. 665, Revised Civil Code (1870) of Louisiana, p. 371 of Dart's Second Edition.* "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees roads and other public or common works.
>
> "All that relates to this kind of servitude is determined by laws or particular regulations."
>
> *Art. 16, Sec. 6 of the Louisiana Constitution of 1921, p. 340 of Dart's Constitutions of the State of Louisiana.* "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage pur-

poses, and for acquiring property within the limits of any duly incorporated municipality of one hundred thousand population or over to be used for constructing new streets or highways where it was necessary to take a previously existing street or highway for levees or levee drainage purposes, shall be paid for at a price not to exceed the assessed value for the preceding year; provided, that this shall not apply to batture, nor to property the control of which is vested in the state or any subdivision thereof for the purpose of commerce; and provided, further, that streets and highways within the limits of any duly incorporated municipality of one hundred thousand population or over shall be restored by the governing authorities of the levee district upon the new location so acquired in order to replace any street or highway actually used or destroyed for levees or levee drainage purposes, and such street or highway shall be of a similar type or character as that of the street or highway used or destroyed.

"If the district has no other funds or resources out of which such payment can be made, it may levy, on all taxable property situated therein, a tax sufficient to pay for said property so taken, and for such streets and highways so relocated and restored, within the limits of any municipality of one hundred thousand population or over not to exceed one-fourth of one mill on the dollar, to be used solely in the district where collected. This shall not prevent the appropriation of said property before payment."

Louisiana Act No. 61 of 1904, Section One, p. 142 of the Official Acts (Louisiana Revised Statutes, Title 38, Section 113). "Be it enacted by the General Assembly of the State of Louisiana. That the various Levee and Drainage Districts of this State shall have control over all public Drainage Channels within the limits of their respective Districts and for a space of one hundred feet on each side thereof, selected by the District and recommended and approved by the Board of State Engineers, whether such drainage channels have been improved by the Levee or Drainage District, or have

been adopted without improvement as necessary parts of or extensions to improve drainage channels; and shall have authority to adopt rules and regulations for preserving the efficiency of said Drainage Channels."

Louisiana Act No. 66 of 1942, p. 202 of the Official Acts (Louisiana Revised Statutes, Title 38, Section 281) "Section 1. Be it enacted by the Legislature of the State of Louisiana. That it is hereby recognized by the legislature that the construction of levees has impaired the normal drainage of the lands in this state that are protected by these levees, and that drainage of these lands is incidental to the levee system of this state, therefore the Levee Boards of this state, Parish of Orleans excepted, are hereby given the authority to do all drainage work that is incidental to or caused to be needed by the construction of levee system of this or adjoining states.

"Section 2. That all of the Levee Boards in the State of Louisiana, Parish of Orleans excepted, in extension of and in addition to the rights they now have under existing laws, are hereby authorized to construct and maintain levees, levee drainage and to do all other things incidental thereto.

"Section 3. Constitutionality; Severability: If any section or provision of this Act or the application thereof to any person or under any circumstances is held unconstitutional or invalid, such unconstitutionality or invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application; and to this end the provisions of this Act are hereby declared severable."

Defendants-appellants filed in the trial court an answer to this petition in which the above allegations were denied. In their answer the defendants, George B. Franklin and George B. Franklin, Jr., in paragraphs 30 and 31 thereof, specially pled that said taking and entering upon their private property in the manner attempted by the Tensas

Basin Levee District constituted a taking of private property without due process of law, and a taking or damaging of private property for purported public purposes without adequate compensation, in violation of Section 2, Article 1 of the Louisiana Constitution of 1921 and in violation of the Fourteenth Amendment to the United States Constitution. It was further pled by defendants that if said laws of Louisiana authorized such an appropriation same were in violation of said Louisiana and United States Constitutional provisions.

After trial in the Fourth District Court for the Parish of Morehouse, State of Louisiana, the Honorable Edward L. Gladney, Jr., Judge of said Court, rendered judgment in favor of the Board of Levee Commissoners of the Tensas Basin Levee District granting it the permanent injunction prayed for. The constitutional question raised by defendants was disposed of in this manner, quoting from the trial judge's reasons for judgment:

> "The cases of Scott v. Red River-Bayou Pierre Levee and Drainage Dist. of Louisiana (April 3, 1942) Ct. App., Drew, J., 7 So. (2d) 428 and Dickson v. Board of Com'rs Caddo Levee Dist., et al. (April 22, 1946) Sup. Ct., Fournet, J., 210 La. 122; 26 So. (2d) 429, in my opinion effectively dispose of the constitutional questions raised by the Defendants. These cases hold the extensive application of Art. 665 and Act 61 of 1904. In the Dickson case the history and functions of Levee Boards are fully discussed and there is no need of this Court looking for further authority." *Quote from next to last paragraph of Reasons for Judgment.*

The defendants took and perfected a suspensive appeal to the Supreme Court of Louisiana, which suspensive appeal, by law, stays the execution of the Judgment. On appeal defendants-appellants filed an Original Brief and a Supplemental Brief. On pages 21 through 23 of the original

brief on behalf of Defendants-appellants this constitutional question was briefed and oral argument was made thereon by defendants' counsel. It has been defendants position thoughout this case, as will be shown by the pleadings, the briefs and the record, that Art. 665 Revised Civil Code (1870) of Louisiana grants to the public a right of servitude *only on property adjacent to a navigable river,* or, in other words, only on riparian property, which defendants' property is ~~now~~ Not; that this has been the jurisprudence of the State of Louisiana and the construction of this codal article for 50 years (*See Pontchartrain R. C.* v. *Board of Levee Commissioners of Orleans Levee District,* 49 La. Ann. 570, 21 So. 765; *Koerber* v. *Orleans Levee Board,* 51 La. Ann. 523, 25 So. 415, and *McGeehan* v. *Board of Levee Com'rs,* 165 La. 241, 115 So. 473); that the constitutionality of this servitude, and the taking or "appropriating" of property thereby, without a hearing, in the manner hereinabove set forth, is only constitutional for the reason that the State of Louisiana has *always* reserved such rights on riparian property, the sovereign never having divested itself of such property right on the shores of navigable streams. (See *Eldridge* v. *Trezevant,* 160 U. S. 452, 40 L. Ed. 490, 16 Sup. Ct. 345); that defendants' property, situated 17 miles from any navigable stream, cannot, therefore, be subjected to this servitude and "appropriated" without a hearing without violating the due process clause of the 14th Amendment to the U. S. Constitution; that for the sovereign to impose, at this date, a new servitude, not previously reserved, on private property, the title to which the state many years ago divested itself without any reservation, would be a taking of property without due process of law; that for this reason Art. 16, section 6 of the Louisiana Constitution of 1921 cannot, without violating the federal constitutional amendment, be interpreted as extending, enlarging or

broadening the ancient servitude which has always been reserved by the State on riparian lands, because to do so would be to impose a new servitude, not reserved by the state previous to the 1921 Constitution; that for the same reason Louisiana Act No. 61 of 1904 (L. R. S. 38:113) and La. Act No. 66 of 1942 (L. R. S. 38:281) cannot, without violating the 14th Amendment to the U. S. Constitution, be interpreted as extending, enlarging or broadening this ancient concept of servitude; that neither can said provisions be interpreted as granting additional rights of servitude; that in holding that the Tensas Basin Levee District had discretion to determine the location of levee improvements and a discretion in "appropriating" property to be used therefor without a hearing, without notice and without compensation defendants are denied due process of law; that if such discretion has been constitutionally granted the Tensas Basin Levee District abused said discretion and defendants were denied due process of law in the failure of the Supreme Court of Louisiana to so hold. It has likewise been claimed by defendants throughout that the "appropriation" in the manner hereinabove shown denys to defendants a hearing at any stage of the proceeding on any question or defense in the case and denys them just and adequate compensation according to value, all of which is a taking of private property without due process of law. In "appropriating" defendants' property under Art. 16, Section 6 of the Louisiana Constitution of 1921, defendants are thereby relegated to a fixed and arbitrary compensation, (the assessed valuation), as provided by that provision, which has no relation to actual value, and it is claimed that as such it is an impairment of just and adequate compensation, and, therefore, a denial of due process. The fact that there is no procedure or machinery under state law requiring notice to defendants of the "appropria-

tion," that there is no right to a hearing of any type, that there is no hearing provided on compensation, that there is no assurance or guarantee that compensation of any kind will ever be paid, and that there is no remedy, action, procedure or machinery under state law for determining the amount of compensation owed for "appropriated" property or for satisfying a judgment against the Tensas Basin Levee District, are also held to constitute a denial of due process. It is claimed as thus interpreted that said Art. 665 Revised Civil Code (1870) of Louisiana, Art. 16, Sec. 6 of the Louisiana Constitution of 1921, Louisiana Act No. 61 of 1904 (L. R. S. 38:113) and Louisiana Act No. 66 of 1942 (L. R. S. 38:281) are repugnant to the 14th Amendment to the U. S. Constitution. It has also been defendants' position that their property is being taken for private purposes, for the private benefit of International Paper Company in providing an outlet for that company's poison waters impounded in its private settling basin, which is a violation of the 14th Amendment to the U. S. Constitution.

After oral argument the Supreme Court of Louisiana rendered judgment in favor of the Board of Levee Commissioners of the Tensas Basin Levee District, as aforesaid, in which the servitude of Art. 665 Revised Civil Code (1870) of Louisiana was extended to include defendants' property and *all* property in the State of Louisiana, *wherever situated,* without regard to whether riparian or non-riparian property. It was said in the opinion that if this authority was not vested in the levee district by virtue of this civil codal article, then there was ample such authority under Louisiana Act No. 61 of 1904, Louisiana Act No. 66 of 1942 and Art. 16, sec. 6 of the Louisiana Constitution of 1921. In disposing of the constitutional question raised by defendants, the Supreme Court of Louisiana had this to say:

> "The defendants contend that the appropriation of the property is a violation of the due process clause of

the federal constitution. We pointed out in the case of Dickson v. Board of Com'rs, supra, that 'Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal constitution that no one can be deprived of his inalienable rights of property without due process of law, it has been consistently held by this court and by the Supreme Court of the United States that such constitutional requirements relate to the right of expropriation and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for the construction of levees, roads, and other such public works have *always been reserved.*'

"In the case of Wolfe v. Hurley, supra, it was held that the provisions in our state constitution, Section 6 of Article 16, fixing the assessed value as the maximum price to be paid for lands appropriated for levees and levee drainage purposes was not repugnant to the due process clause of the federal Constitution." (Emphasis Supplied.)

The Supreme Court of Louisiana thus erred for the reason that it was clearly shown that defendants' property was not riparian and the state had not *always* reserved a right of servitude on such land. *See Dissent from Refusal to Grant a Rehearing.* The Court further erred for the reason that this fixed compensation is constitutional only on the grounds that the state already owns the property and that the compensation granted by this constitutional provisions is in reality only a gratuity. See *Wolfe* v. *Hurley,* 46 F. (2d) 515, affirmed, 51 S. Ct. 493, 283 U. S. 801, 75 L. Ed. 1423; *Mayer* v. *Bd. of Com'rs,* 150 So. 295.

As hereinabove stated, defendants filed a timely application for Rehearing in the Supreme Court of Louisiana. In support of this application another brief was filed and on pages 18 through 20 thereof, defendants again argued that the opinion of the Supreme Court of Louisiana, in making

all lands, regardless of where situated, subject to a public servitude violates the due process clause of the Fourteenth Amendment to the U. S. Constitution as well as Sec. 2 of Art. 1 of the Louisiana Constitution of 1921. This rehearing was denied, as aforesaid. Mr. Justice Hawthorne of said Court, however, dissented from the refusal to grant a rehearing and handed down written reasons. In concluding his dissent, he had this to say:

> "The right of the levee board to *expropriate* the property to be used for the drainage canal is not questioned. The serious question here presented is whether the property because of its nature and location was acquired subject to the servitude imposed by Article 665. If so, the levee board may appropriate it without violating the provision of the United States Constitution.
>
> "Since I consider that a serious federal constitutional question is involved, I am of the opinion that a rehearing should have been granted so that this court might give further consideration to the question."

This case presents a substantial Federal question which has not heretofore been adversely passed upon by this Court. One of the first essentials of due process of law is that of reasonable notice, which, with respect to the taking of private property for public purpose, is reasonable notice to be heard. *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 69 L. Ed. 953, 45 S. Ct. 491; *Ownbey* v. *Morgan*, 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433. Due process requires as a matter of right that the owner be afforded notice of the acquisition. *Roller* v. *Holly*, 176 U. S. 398, 44 L. Ed. 520, 20 S. Ct. 410. The law itself must provide for this notice. It is not enough that some notice or information is given to the owner. *Kuntz* v. *Sumption*, 117 Ind. 1, 2 L. R. A. 655. On this very first requirement the procedure adopted by the Tensas Basin Levee District and the State laws said to authorize same are found wanting in due process. There is no

requirement or prerequisite that notice of the acquisition of property by the levee district be given to the owner. It is not made mandatory by any law of the State of Louisiana or made by law the basis of the acquisition by the levee district. For all that is required by state law, the Tensas Basin Levee District could acquire a right of way through defendants' property and construct its drainage canal without defendants ever having the slightest knowledge of that fact.

Another essential of due process is that the mode of determining compensation for private property taken for public purpose be such as to afford the owner an opportunity to be heard. *Bragg* v. *Weaver,* 251 U. S. 57, 64 L. Ed. 135, 40 S. Ct. 62. This hearing on the question of compensation is the most essential element of due process. It may be afforded to the owner by means of a right of appeal to the courts from an award by commissioners, as in the cited case, but a hearing, nevertheless, in some form provided by law must be had in the course of condemnation proceedings where the owner has an opportunity to be heard and to offer evidence as to value. *Bailey* v. *Anderson,* 326 U. S. 203, 90 L. Ed. 3, 66 S. Ct. 66. The laws of the State of Louisiana under which the Tensas Basin Levee District purported to "appropriate" defendants' property. *(Art. 665 Revised Civil Code (1870) of Louisiana, Art. 16, Sec. 6 of the Louisiana Constitution of 1921, Louisiana Act No. 61 of 1904 (L. R. S. 38:113), Louisiana Act No. 66 of 1942 (L. R. S. 38:281)),* do not provide for such a hearing or even imply that the property owner is entitled to be heard. At no stage in the condemnation is the property owner entitled to any hearing or to be heard in a judicial or administrative proceeding on any question or defense in the case, including that of compensation. Defendants, George B. Franklin and George B. Franklin, Jr., were not, in fact, afforded such a hearing before the "appropriation" nor are they entitled

under the above state laws to a hearing prior thereto, after the "appropriation" or at any other time on the question of compensation. This undeniably constitutes a denial of due process under *Bragg* v. *Weaver, Bailey* v. *Anderson, supra,* and many other cases decided by this Court wherein it has been repeatedly stated a hearing on the question of compensation must be provided by law at some stage in the condemnation.

Not only is a hearing on the question of compensation essential to due process, but it is also essential that the hearing be such as to afford the property owner just and adequate compensation according to the value of the property taken for public purposes. It is said that the term "compensation" itself implies a full and complete equivalent for the loss sustained by the owner. *Olson* v. *U. S.,* 67 F. (2d) 24, aff'd 292 U. S. 246, 78 L. Ed. 1836, 54 S. Ct. 704; *U. S.* v. *Klamath and Moadoc Tribes,* 304 U. S. 119, 82 L. Ed. 1219, 58 S. Ct. 799. This compensation, according to value, cannot be evaded or impaired by any form of legislation. *Baltimore & O. R. Co.* v. *U. S.,* 298 U. S. 349, 80 L. Ed. 1209, 56 S. Ct. 797. A fixed rate of compensation for private property taken for public purposes is, therefore, unconstitutional. *See Lafayette Parish* v. *Martin,* 140 La. 848, 74 So. 170, wherein compensation fixed at double the assessed valuation was held unconstitutional. In taking or "appropriating" defendants' property under *Art. 16, sec. 6 of the Louisiana Constitution of 1921* the levee district has, however, limited defendants, if they are entitled to any compensation, to the fixed and arbitrary compensation provided therein, which constitutes an impairment of just and adequate compensation and therefore a denial of due process. This constitutional provision provides:

> "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage pur-

> poses, . . . shall be paid for at a price not to exceed the assessed value for the preceding year; . . ."

There is no other provision in Louisiana law, under any of the state laws relied upon by the levee district or in any other law of the State of Louisiana for the payment of compensation for property used for levee or levee drainage purposes. The above cited constitutional provision is the only authority for the payment of such compensation. Therefore, it is the position of the defendants that if they are entitled to any compensation under Louisiana law it is only that fixed and arbitrary compensation provided by this provision, and this has no relation to actual value of the property or the loss which is sustained. It is a matter of common knowledge that real property is not assessed in Louisiana at its real, actual or market value and this has been judicially noticed by our Courts. *State* v. *Barbe,* 209 La. 185, 24 So. (2d) 372. The opinion of the Supreme Court of Louisiana in this case recognized the fact that defendants were relegated to the fixed and arbitrary compensation provided by this constitutional provision and further held that same was not repugnant to the due process clause of the Federal Constitution. In concluding its opinion and decree said Supreme Court of Louisiana said:

> "In the case of Wolfe v. Hurley, supra, it was held that the provision in our state Constitution, Section 6 of Article 16, fixing the assessed value as the maximum price to be paid for lands appropriated for levee and levee drainage purposes was not repugnant to the due process clause of the federal Constitution."

However, the Supreme Court of Louisiana in its majority opinion failed to make the following observation and distinction which was made by Mr. Justice Hawthorne of said Court in his Dissent from Refusal to Grant a Rehearing:

> "Article 16, Section 6, of the Louisiana Constitution fixes the price for property actually used or destroyed for levees or levee drainage at the assessed valuation, but, as pointed out in Wolfe v. Hurley, 46 F. (2d) 515, affirmed by the United States Supreme Court, the price so fixed is nothing but a gratuity because the state had a right to appropriate property *adjacent to navigable streams* without any compensation under Article 665. The assessed value certainly is not just and adequate compensation." (Emphasis supplied.)

This statement by Mr. Justice Hawthorne in his Dissent is a correct statement of the law. He makes the proper distinction between riparian and non-riparian property which makes a difference in the application of the federal constitution. As hereinabove pointed out, this Court has held that property situated *adjacent* to a navigable stream, but only that situated adjacent to a navigable stream, could be appropriated without any compensation whatever, the reason being that the State has always, from the time of its possession by Spain and France, reserved a servitude on property so situated. See *Eldridge* v. *Trezevant*, 160 U.S. 452, 40 L. Ed. 490, 16 Sup. Ct. 345. Therefore, when the State provides in said Art. 16, sec. 6 of the Louisiana Constitution of 1921 for payment of the assessed valuation on the property "appropriated" it is actually only providing for the payment of a gratuity since the state already owns a servitude on the shores of navigable streams. This was correctly observed in *Wolfe* v. *Hurley*, 46 F. (2d) 515 (D.C. La.), cited by the majority opinion, wherein it was said:

> "From ancient times, and until quite recently, in Louisiana, the civil law has required the owner of property bordering upon a navigable stream to give without compensation, so much thereof as might be needed for the construction of levees and highways. . . . This rule, of course, antedated both the federal and state

Constitutions, and was recognized as coexistent with those principles which were subsequently embraced in the written provisions of the Fifth Amendment to the Federal Constitution and the Bill of Rights, or what is now Section 2 of article 1 of the state Constitution 1921; *hence the latter were adopted subject thereto.*

". . . property bordering upon navigable streams . . . continued to bear the burden of this servitude without compensation, until 1921, when section 6 of article 16 was placed in the Constitution, which we quote as follows:

"Of course, if the state and its agencies, the levee boards, were not required, under either the federal or state Constitutions, to pay for property so taken, before the changes in the law above quoted, then any provision added for that purpose was in the nature of a concession, which the framers of the Constitution were at liberty to qualify or limit, as they deemed proper. For this reason, in so far as the taking of any lands which could have been demanded before the change is concerned, we see nothing in the Fourteenth Amendment that affects the provisions of section 6 of article 16 of the Constitution of 1921. In other words, being in legal contemplation a gratuity, its extent was subject to the will of the lawmakers fixing the assessed value as the maximum price to be paid for lands used for levee purposes. We think it scarcely necessary to cite authority to sustain this conclusion, but see Boyce Cottonseed Oil Co. v. Board of Commissioners, 160 La. 727, 107 So. 506." (Emphasis Supplied) *46 F. (2d) at p. 520.*

Thus we see that the payment of assessed valuation on property *adjacent* to navigable streams which is "appropriated" is constitutional because of a servitude exists on such lands that antedated the federal and state constitutions, and hence the latter were made subject thereto. The same is not true of defendants' property which is situated 17 miles from a navigable stream. There was no provision

in the colonial territory of Louisiana, before its acquisition by the United States, making such lands subject to a public servitude. *Pontchartrain R. Co.* v. *Board of Levee Commissioners of Orleans Levee District, supra; Koerber* v. *Orleans Levee Board, supra; McGeehan* v. *Board of Levee Com'rs, supra.* No provision for a servitude on such non-adjacent property is in existence which antedates the federal and state constitutions. Therefore, the 14th Amendment of the federal constitution is applicable and compensation equivalent to the loss sustained by the owners is essential to due process of law. Prior to the 1921 Constitution such non-adjacent property could certainly not be taken without compensation. To so hold would be to delete the due process clause of the constitution. The situation is not changed by Art. 16, sec. 6 of said state constitution and just and adequate compensation must still be paid. The fact that the Supreme Court of Louisiana recognizes as constitutional the relegation of defendants to the assessed valuation and the fact that no procedure or action is authorized by state law for determining a just and adequate compensation based on value is sufficient to show a denial of due process of law under the authorities hereinabove cited.

Besides the fact that the state laws relied upon by the Tensas Basin Levee District do not provide for notice, a hearing on compensation or just and adequate compensation, said laws likewise do not provide any certain or reasonable assurance for actual payment of compensation before the owners are disturbed in their occupancy. Although it is said that the federal constitution does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken, the owner is nevertheless entitled under the due process clause of the Constitution to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U.S. 641, 34 L. Ed

295, 10 Sup. Ct. 965. Yet the Tensas Basin Levee District claims in this case a right to "appropriate" and "occupy" defendants' property previous to payment of compensation and did actually appropriate and occupy defendants' said property without their consent, without their knowledge and without payment of any kind of compensation, based on the assessed valuation or otherwise all of which was sustained by the Supreme Court of Louisiana. The state laws relied upon by the levee district, *Art. 665 Revised Civil Code (1870) of Louisiana, Art. 16, sec. 6 of the Louisiana Constitution of 1921, Louisiana Act No. 61 of 1904 and Louisiana Act No. 66 of 1942,* do not contain any provision giving defendants that protection which is constitutionally necessary to occupancy in advance of payment. Said laws do not provide for the payment into Court of double the amount of the award by commissioners pending the exercise of a right of appeal to the courts, as in *Cherokee Nation* v. *Southern Kansas R. Co., supra.* Neither do said state laws provide for the giving of bond pending a determination of the amount of compensation, nor do they provide for the issuance of execution against the levee district, as in *Joslin Manufacturing Company* v. *City of Providence,* 262 U.S. 668, 67 L. Ed. 1167, 43 Sup. Ct. 684. Said state laws, however, do afford the Tensas Basin Levee District an immediate right to occupancy, as interpreted by the Supreme Court of Louisiana, although no provision is made assuring certain and adequate payment of compensation as required by due process. *Sweet* v. *Rechel,* 159 U.S. 380, 40 L. Ed. 188, 16 Sup. Ct. 43. Furthermore, assuming that the Louisiana courts permitted a judgment against the Tensas Basin Levee District, although such an action is not authorized by any state law or statute, there would be no way to enforce this judgment. Under Louisiana law, property, whether movable or immovable, title to which is

vested in the public, is immune from seizure under execution in satisfaction of a judgment. *J. B. McCrary Co.*, v. *Town of Winnfield*, 40 Fed. Supp. 427 (D. C. La.) See also *Carter* v. *State*, 42 La. Ann. 927, 8 So. 836. Even rents of property dedicated to a parish for public use are, like the property itself, exempt from seizure for debt. *Kline* v. *Parish of Ascension*, 33 La. Ann. 562. Thus, even assuming a constitutional right to compensation conferred on defendants, that right, by its unenforceability, is made unconstitutional. There would be no way under Louisiana law to enforce a judgment for compensation against the Tensas Basin Levee District. As well as a constitutional right to a hearing, defendants are entitled to an adequate provision for the certain payment of compensation without unreasonable delay. *Bragg* v. *Weaver*, 251 U.S. 57, 64 L. Ed. 135, 40 Sup. Ct. 62. Such adequate provision is not furnished by any Louisiana laws and defendants are, therefore, denied due process of law under the decision of the Supreme Court of Louisiana.

We have shown at length the absence of the essentials of due process in the condemnation or expropriation of private property for public purposes. This presupposes that the State of Louisiana does not "own" a servitude on defendants' property, which the record will show is situated 17 miles from a navigable stream and separated therefrom by a range of intervening hills. *See Maps filed in evidence as P-20 and D-6, Transcript pp. 217 and 230.* That property so situated does not owe such a servitude is shown by the historical development of the servitude and the decisions of this Court touching the constitutionality of same. The history of the servitude is traced by the Court in *Dickson* v. *Board of Com'rs of Caddo Levee Dist.* 210 La. 121, 26 So. (2d) 474 where it was pointed out that in Colonial days, while Louisiana was still a territory in the possession of France and Spain, all grants of land along navigable

streams were made with the specific reservation therein for the common use of the public of all rights to the shores of rivers and bayous upon which the property might front. Thus these two countries never divested themselves of title to lands lying immediately adjacent to navigable streams. This policy, it is stated, later became merged with the law relative to servitude to be found in the ancient Las Siete Partidas of Spain and, in time, found its way into the First Civil Code, adopted by the Territory of Orleans in 1805 after this territory, comprising what is now known as the State of Louisiana, was acquired by the United States, and is now found in our Civil Code as Art. 665. This right of the public is thus of ancient origin and based on the concept that the public or the state has never divested itself of such rights along navigable streams. It was recognized in *Wolfe* v. *Hurley, supra,* that this public servitude antedated both the federal and state constitutions and for that reason the State could either allow or disallow compensation for property so situated taken for public purposes. There was nothing, however, in the ancient law of France or Spain or in the ancient laws of the Territory of Louisiana granting to the public such a public servitude on all lands in the state, *wherever situated,* and this is the effect of the present decision by the Supreme Court of Louisiana. Under such a ruling defendants' property was appropriated as owing a servitude to the public, although under the ancient laws of Spain and France and the ancient law of Art. 665 Revised Civil Code (1870) of Louisiana it was not embraced or included in those lands upon which the State reserved such property right. On the contrary, the State has long since divested itself of such property right and as hereinabove pointed out the Courts of this state have recognized that fact for the past 50 years of jurisprudence. *See Pontchartrain Railroad Co. case, etc., supra, and Dissent from Refusal to Grant a Rehearing.* In not following this

prior jurisprudence of Louisiana the defendants have been deprived of substantial constitutional rights. Previous to the present opinion no federal or state case ever recognized the servitude mentioned in Article 665 of the Revised Civil Code (1870) of Louisiana to embrace non-riparian property. The distinction between riparian and non-riparian property has been completely ignored by the Supreme Court of Louisiana in this case, resulting in a deprivation of defendants' constitutional rights and an extension of the servitude concept far beyond its original limits. As will hereinafter be shown, this extension virtually eliminates any necessity for having laws on expropriation on our statute books, for the ownership given the state by this servitude also confers an absolute right to take property in any manner it chooses, with or without compensation.

In *Eldridge* v. *Trezevant*, 160 U. S. 452, 40 L. Ed. 490, 16 Sup. Ct. 345, this Honorable Court was called upon to review this servitude peculiar to Louisiana. It found, as we have stated, that it was based on the ancient laws of France and Spain in this state antedating the federal constitution. After reviewing one Louisiana case which appeared on its face to repudiate this servitude, this Court declared:

> "But we do not understand that the supreme court of the state intended thereby to repudiate the doctrine of a servitude, explicitly declared in the Code, and recognized through a long period by many decisions. If, to approve the judgment in that case, it were necessary to hold that the state and its agents can take private property *wherever situated*, and apply it to any public purpose, and escape from the duty of compensation by terming such action an exercise of the police power, it is difficult to see how such a conclusion could be reached by the courts of a state in whose Constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made. But, as we have said, it is not

necessary to so read the decision in question, nor to consider whether, even in such a case, a remedy could be found in any provision of the Federal Constitution." (Emphasis Supplied, 160 U. S. at p. 465.)

Thus this Court clearly contemplated that such a servitude existing on all property, wherever situated, without regard to its ancient origin, would clearly be unconstitutional. This Court was dealing with riparian property, property situated *adjacent* to a navigable stream, and for the reason that the State had reserved such right on property so situated sustained the constitutionality of the taking without compensation. It did not hold and no decision of our state court previous to the present one has held that non-riparian lands were embraced by this servitude. In the present controversy the property is non-riparian and does not and cannot fall within the legal definition of "adjacent" as meaning "near to, next to or neighboring." Furthermore, the decision of the Supreme Court of Louisiana clearly applies the servitude to all lands in the State of Louisiana regardless of where situated, and on this basis holds that defendants' property may be appropriated which is exactly what this Court contemplated as unconstitutional although that situation was not before the Court.

The ancient servitude which has come to us from France and Spain cannot be extended or enlarged beyond the limits prescribed for it when this State was purchased by the United States. To do so would destroy the effect of our federal constitution. When Louisiana was admitted to the Union it retained the power which it, as a sovereign nation, possessed prior to the adoption of the national Constitution, so far as such power pertained to the internal affairs of the state. *U. S.* v. *Shauver,* 214 F. 154, error dismissed, 1919, 248 U. S. 594, 63 L. Ed. 438, 39 Sup. Ct. 134. It retained all the attributes of sovereignty except as they have been sur-

rendered by formation of the Constitution. *Cummings* v. *State of Missouri*, 71 U. S. 277, 4 Wall. 277, 18 L. Ed. 356. Thus Louisiana retained an "ownership" in or servitude on property adjacent to navigable streams, that being the law of this state when possessed by France and Spain. Thus the "appropriation" of such property was held constitutional. This right of the state, antedating the federal and state constitutions, was recognized in *Wolfe* v. *Hurley, supra,* and *Eldridge* v. *Trezevant, supra,* and made the basis of the constitutionality of the "appropriation." As hereinabove pointed out, this servitude has been limited to riparian property by the courts of this state for 50 years. *Pontchartrain R. Co. Case, etc., supra.* Now, therefore, the state cannot seek to impose the servitude on non-riparian property, because it is restricted by the federal constitution in that private property shall not be taken for public purposes without due process of law. For this reason Art. 16, sec. 6 of the La. Constitution of 1921, Louisiana Act No. 61 of 1904 and Louisiana Act No. 66 of 1942 cannot extend this ancient servitude. The federal constitution prohibits it, no such right having been previously reserved by the state. *Wolfe* v. *Hurley, supra,* and *Eldridge* v. *Trezevant, supra,* both recognize this and at the same time the situations presented in those cases are distinguishable from the present controversy, for there riparian rights were undeniably involved. This will be accepted as a true statement when it is realized that to extend the ancient servitude so unreasonably will be to virtually obviate the necessity of ever resorting to lawful expropriation where compliance with the principles of due process are essential. Louisiana and every state in the Union could pass laws or adopt constitutional amendments making all property subject to a public servitude, thus claiming an "ownership" which dispenses with conformity to the accepted rules of due process.

Thus we submit that a substantial federal question is involved, a question which has not been previously decided by this Court adversely to defendants. Since there is no servitude on defendants' property antedating the federal constitution, a position clearly taken by this Court in *Eldridge* v. *Trezevant, supra,* it is our position that it was necessary for Tensas Basin Levee District to adopt a condemnation procedure conforming to the principles of due process. The failure of the state laws under which said levee district proceeded to provide for notice, a hearing on compensation, adequate compensation based on value and some assurance of being able to enfore payment of compensation constitutes a denial of due process as guaranteed by the 14th Amendment to the U. S. Constitution. In *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 42 L. Ed. 853, 18 Sup. Ct. 445, this Court said:

> "Inasmuch as the respondents, both on the trial in the circuit court and in the subsequent proceedings on the certiorari in the supreme court, specifically set up and claimed rights under the Federal Constitution which were denied, the jurisdiction of this court is not open to doubt . . ."
>
> "It is also not open to further debate, since the decision in *Chicago, Burlington & Q. Railroad Co.* v. *Chicago,* 166 U. S. 226 that this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation . . ."

The present case falls within the foregoing statement of jurisdiction and it is clearly shown that defendants' have been denied substantial federal rights by the decision of the Supreme Court of Louisiana, which not only affect them but all property owners in the State of Louisiana. The record

will further show that there has been a palpable abuse of discretion by the Tensas Basin Levee District, if it is validly and constitutionally vested with a discretion in determining the lands to be "appropriated." Defendants' property is situated 17 miles from a navigable stream and the area proposed to be drained. The proposed canal does not reach this area, but is only three miles in length and will only receive the waters from this area after it has reached the canal by other means. There is no benefit to defendants' property and under these circumstances it could hardly be defined as "near, next to, or neighboring" to a navigable stream. Under these circumstances there was an abuse of said discretion, allegedly existing in the levee district, and the Supreme Court of Louisiana erred in failing to so hold and that this also presents a substantial federal question.

The appellants append hereto a copy of the reasons for judgment and Judgment of the Fourth District Court for the Parish of Morehouse, State of Louisiana, a copy of the opinion and decree of the Supreme Court of Louisiana and a copy of the Dissent from Refusal to Grant a Rehearing which was handed down by the Honorable Associate Justice Hawthorne of the Supreme Court of Louisiana.

Respectfully submitted,

(S.) WARREN HUNT,
(S.) JOHN C. MORRIS, JR.,
(S.) ALCIDE J. WEYSHAM,
Attorneys for Defendants-Appellants.

APPENDIX "A"

SUPREME COURT OF LOUISIANA

No. 39,793

BOARD OF COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT

v.

GEORGE B. FRANKLIN, SR., *et al.*

On Appeal from the Fourth Judicial District Court in and for the Parish of Morehouse

Honorable Edward L. Gladney, Jr., Judge

PONDER, *Justice:*

The plaintiff brought suit against the defendants seeking to enjoin them from interfering with the works being done on the Little Bayou Boeuf drainage project. At the hearing of a rule nisi for a preliminary injunction, all the evidence was adduced and the opposing parties agreed that judgment be rendered on the merits of the case. The trial court gave judgment granting a permanent injunction. The defendants have appealed.

In 1946, the Chief Engineer of the Department of Public Works of this state advised, by letter, the President of the Mississippi River Commission that certain streams in Louisiana, including Little Bayou Boeuf were greatly in need of clearing and snagging and asking for them to be included in his program. It appears that the Mississippi River Commission is an agency whose duty it is to keep Congress informed as to conditions and to make recommendations for flood control upon the reaches of the Mississippi River. Approximately a year later, the Board of Commissioners of the Tensas Basin Levee District was advised by the Department of Army Corps of Engineers, New Orleans Office, that $25,000.00 had been allocated by the Secretary of War, under the provisions of the Flood Con-

trol Act, for the cleaning, snagging and straightening the channel of Little Bayou Boeuf, Morehouse and Ouachita Parishes, from its mouth to Perryville, provided there be furnished "satisfactory assurances of local co-operation which levee boards are authorized to furnish on drainage projects as well as on levee improvements." The Chief Engineer of the Department of Public Works informed the board by letter in 1948 that the location and plan of the proposed work, showing limits of the rights-of-way required, had been examined and approved by the district engineer of the department and recommmended that the necessary rights-of-way be furnished. By resolution, dated March 8, 1949, the Levee Board formally agreed to the conditions imposed by the Corps of Engineers and notified the property owners by registered mail on April 1, 1949 that the rights-of-way were appropriated across their lands; among those notified were the defendant, George B. Franklin and Chess & Wyman Company. George B. Franklin, Jr. subsequently acquired from Chess & Wyman Company the property through which this bayou runs.

Pursuant to the assurances furnished by the Levee Board, the Secretary of the Army made a contract with the Delta Equipment & Construction Company for the improvement of the channel of Little Bayou Boeuf. After the work had progressed to a point on lands claimed by the appellants, the contractor was forcibly prevented by the appellants from proceeding further with the work. The Levee Board brought this suit to restrain the appellants from interfering with the construction of the works.

From the maps offered in evidence and the testimony of the District Engineer of Public Works, it appears that the improvement of the channel of Little Bayou Boeuf will facilitate the flow and drain of waters from the Bartholomew Levee. The District Engineer, who acts in an advisory capacity to the Levee Board, testified the improvement would remedy the situation existing at Bayou Bartholomew. He described the Horse Bayou condition as a bad one which has not only affected the security of the levee but has in recent years inundated considerable farm lands and an important highway. He stated that the Police Jury has awarded a contract for a canal that will further hasten the

flow of waters from the vicinity of Horse Bayou into the watershed of Little Bayou Boeuf, which makes the over-all improvement of Little Bayou Boeuf more important. The Levee Board takes the position that the area north of Bastrop can only be drained through flood gates situated where Horse Bayou intersects the levee on the left descending bank of Bayou Batholomew and this drainage, during seasons of lower water in Bayou Bartholomew, flows through these flood gates by force of gravity, while, during periods of high water in the bayou, the drainage in the area flows southerly through Little Bayou Boeuf into Bayou La-Fourche. The board takes the position that the construction of the levee on the left descending bank of Bayou Bartholomew, during periods of high water, when the flood gates are necessarily closed, has created a serious drainage problem, resulting in the land-side of the levee being submerged by water, thus making it impossible to detect sand-boils and weak spots in the levee and that the diversion of the water caused by the construction of the levee has brought about the inundation of considerable farm lands in the vicinity of Horse Bayou and has raised the level over lands over which the water is forced to travel along the course of Little Bayou Boeuf to Bayou LaFourche. The board states that the improvement program on Little Bayou Boeuf will provide drainage that would minimize or eliminate the high water stages on Bayou Bartholomew.

The evidence offered for the plaintiff shows that the Levee Board and the Department of Public Works consider this drainage project is a necessary part to an over-all drainage plan for the area and that it is necessary for the protection of the Bayou Bartholomew Levee. We cannot substitute our judgment as to the feasibility of the project or say that it is unrelated to the Bartholomew Levee. To do so, we would have to reject the testimony of the District Engineer of the Department of Public Works. It is hard to believe that the United States Government would have appropriated the money if it were not necessary for flood control. Moreover, the Levee Board has great latitude in locating levees with the right to protect them in a manner found to be most expeditious from an engineering, economical and practical standpoint. Its action is jurisdic-

tional and is not subject to review unless there has been some palpable abuse. Dickson v. Board of Commissioners of Caddo Levee District, 210 La. 121, 26 So. (2d) 474, and authorities cited therein.

The defendants contend that the plaintiff has no authority in law to appropriate the property involved in this suit. They take the position that the plaintiff can only obtain this property through expropriation proceedings. Their contention is based on their argument that Article 665, Revised Civil Code, and Section 6 of Article 16 of the Constitution do not grant the plaintiff authority to appropriate property not situated on navigable streams. They say that an interpretation of this constitutional provision, when construed with a provision of a prior Constitution, Article 312 of the Constitution of 1898, demonstrates that this provision of the present Constitution deals only with the right of compensation. It is further argued that this provision of our Constitution does not extend the servitude granted under Article 665, R. C. C. to property not situated along navigable streams. To support their contention that the right of appropriation is governed by Article 665, R. C. C., they cite Dickson v. Board of Commissioners, supra. We have carefully examined the opinion in that case and find that it reviews the history of this article of the Civil Code and laws enacted to protect our state from flood waters. In view of the fact that the drainage of most of the Mississippi Valley flows through this state and the further fact that our state has many streams and natural drains, flood control is very vital to our welfare. Our lawmakers have been enacting, from time to time, progressive measures to prevent and to minimize the damage caused by flood waters. Article 665, R. C. C. has been interpreted to apply not only to property actually adjoining the river edge but to all of that which is within range of the reasonable necessity of the situation as produced by the forces of nature unaided by artificial causes. Wolfe v. Hurley, 46 F. 2d 515, affirmed 283 U. S. 801, 75 L. Ed. 1423, 51 S. Ct. 493. While the issue presented in this case is different from that presented in the case of Dickson v. Board of Com'rs, supra, the reasons given for the decision and the statements made therein support the construction placed on this article of the Code by

the federal court. A construction of this codal article so as to apply only to the shores of navigable streams would be too narrow and defeat the purpose sought to be obtained. It would be useless to build a levee if it could not be protected. But be that as it may, when the codal article is construed with Act 61 of 1904 and Act 66 of 1942, it is apparent that the plaintiff had ample authority to appropriate this property. Moreover, if there were any doubt as to the authority of the plaintiff to appropriate this land under the codal article and statutes, the plaintiff had ample authority under Section 6 of Article 16 of the Constitution of this state which authorizes the appropriation of property used or destroyed for levee drainage purposes. What is necessary for levee drainage purposes is a question of fact and, as pointed out above, Levee Boards have the responsibility of providing sufficient levees and levee drainage to relieve the state from the hazards of flood waters. They make a study of flood control and have the benefit of the advice and assistance of officials of the United States Government, including the Mississippi River Commission and the Army Corps of Engineers, and also the Department of Public Works. Since no palpable abuse has been shown, we cannot substitute our judgment as to the feasibility of the levee drainage project when these experts, after a careful study of the situation have arrived at the conclusion that it is necessary for levee drainage. We cannot agree that Article 312 of the Constitution of 1898 aids in the constuction of Section 6 of Article 16 of our Constitution. This article of the previous Constitution deals with compensation of property appropriated by the Orleans Levee Board.

The defendants contend that the drainage project is the construction of a new canal across their property and that the provisions of Act 61 of 1904 are not applicable. It appears that Little Bayou Boeuf is a natural drain. But be that as it may, as pointed out above, the board had ample authority under our Constitution to appropriate lands found to be necessary for levee drainage.

The defendants contend that the drainage canal is primarily constructed to care for the water flowing from the settling basin of the International Paper Company and that

their property is being taken for a private purpose. We have examined the record and find no substantial evidence to support the contention. In fact, the evidence overwhelming by refutes it.

The defendants contend that the appropriation of the property is a violation of the due process clause of the Federal Constitution. We pointed out in the case of Dickson v. Board of Com'rs, supra, that "Despite the repeated contention in numerous litigations that Article 665, imposing this servitude on riparian lands, controverts the constitutional guarantee in both the state and federal Constitutions that no one can be deprived of his inalienable rights of property without due process of law, it has been consistently held by this court and by the Supreme Court of the United States that such constitutional requirements relate to the right of expropriation and do not have the effect of abrogating our law giving the state authority to appropriate land upon which rights for the construction of levees, roads, and other such public works have always been reserved."

In the case of Wolfe v. Hurley, supra, it was held that the provision in our state Constitution, Section 6 of Article 16, fixing the assessed value as the maximum price to be paid for lands appropriated for levee and levee drainage purposes was not repugnant to the due process clause of the federal Constitution.

For the reasons assigned, the judgment is affirmed at appellants' cost.

APPENDIX "B"

No. 39793

BOARD OF COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT

versus

GEORGE B. FRANKLIN, SR., *et al.*

HAWTHORNE, *J.*, Dissenting from Refusal to Grant a Rehearing:

The effect of the decision in this case is to extend the servitude established by Article 665 of the Civil Code beyond the limits prescribed for it by the jurisprudence of this court of the last 50 years, or to hold that the servitude has been extended by Article 16, Section 6, of the Louisiana Constitution, so as to make subject to it any property in the State of Louisiana which a levee board may deem necessary for levees or levee drainage, and that consequently such property may be appropriated. Under Article 665 a servitude is imposed on property *adjacent* to a navigable stream, and such property may be appropriated because in this state it has always been reserved to the public and is always acquired subject to the servitude. See Eldridge v. Trezevant et al., 160 U. S. 452, 16 S. Ct. 345, 40 L. Ed. 490. Can it be said that property situated 17 miles from a navigable stream is adjacent to it and subject to appropriation by the levee board for the purpose of digging a drainage canal for levee drainage?

If Article 16, Section 6, extended the servitude recognized in Article 665 of the Code, and the property in the instant case is burdened with such servitude (of this I have grave doubt), and the levee board has the right to appropriate it, then does our constitutional article violate the provision of the Fourteenth Amendment to the United States Constitution that no state shall deprive any person of property without due process of law? Article 16, Section 6, of the Louisiana Constitution fixes the price for property actually

used or destroyed for levees or levee drainage at the assessed valuation, but, as pointed out in Wolfe v. Hurley, 46 F. 2d 515, affirmed by the United States Supreme Court, the price so fixed is nothing but a gratuity because the state had a right to appropriate property adjacent to navigable streams without any compensation under Article 665. The assessed value certainly is not just and adequate compensation.

The right of the levee board to *expropriate* the property to be used for the drainage canal is not questioned. The serious question here presented is whether the property because of its nature and location was acquired subject to the servitude imposed by Article 665. If so, the levee board may appropriate it without violating the provision of the United States Constitution.

Since I consider that a serious federal constitutional question is involved, I am of the opinion that a rehearing should have been granted so that this court might give further consideration to the question.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 283

GEORGE B. FRANKLIN, SR., AND GEORGE B. FRANKLIN, JR.,

Appellants,

vs.

BOARD OF LEVEE COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

MOTION TO DISMISS

C. C. WOOD,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 283

BOARD OF LEVEE COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT,
Plaintiff-Appellee

vs.

GEORGE B. FRANKLIN, SR., AND GEORGE B. FRANKLIN, JR.,
Defendants-Appellants

MOTION TO DISMISS THE APPEAL

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Now into this Honorable Court, through undersigned Counsel, comes the Board of Levee Commissioners of the Tensas Basin Levee District, State of Louisiana, Appellee in the above entitled cause and with respect shows the Court:

I

That any appeal sought to be made to this Honorable Court in this cause is without foundation in law or in fact

in view of the absence and lack of any Federal question for this Court to consider or determine and this Court is therefore without jurisdiction to entertain an appeal in this cause.

II

That Appellants herein seek an appeal of this cause to this Honorable Court on the grounds that the judgment of the Supreme Court of Louisiana maintaining a permanent injunction against said Appellants is in violation of the Fourteenth Amendment to the Constitution of the United States in that Act 61 of the Louisiana Legislature of 1904, Article 665 of the Louisiana Revised Civil Code of 1870 and Article 16, Section 6 of the Louisiana Constitution of 1921 are all in violation of said Fourteenth Amendment to the Constitution of the United States. The appropriate portions of those laws provide respectively as follows:

ACT 61 OF 1904

"The various Levee and Drainage Districts of this State shall have control over all public Drainage Channels within the limits of their respective Districts and for a space of 100 feet on each side thereof, selected by the District and recommended and approved by the Board of State Engineers * * *"

ARTICLE 665 OF THE LOUISIANA REVISED CIVIL CODE OF 1870

"Servitudes imposed for the public or common utility, relates to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works."

"All that relates to this kind of servitude is determined by laws or particular regulations."

ARTICLE 16, SECTION 6 OF THE LOUISIANA CONSTITUTION OF 1921

"Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, * * * shall be paid for at a price not to exceed the assessed value for the preceding year; * * * This shall not prevent the appropriation of said property before payment."

Appellants specially pleaded the alleged unconstitutionality of the aforementioned Act 61 of 1904 and Article 665 of the Louisiana Revised Civil Code of 1870 with respect to both the State and Federal Constitutions but the record fails to disclose that said Appellants ever pleaded the incompatibility of the Fourteenth Amendment and Article 16, Section 6 of the Louisiana Constitution even though such plea could have been filed in the Supreme Court of Louisiana while the case was being considered by that Court. Having failed to make such special plea in the State Court we submit that Appellants may not now be heard to urge that plea in this Court for the first time.

Even if it be conceded for the purpose of argument, and it surely is not conceded for any other purpose, that Article 665 of the Revised Civil Code and Act 61 of 1904, as applied by the Supreme Court of Louisiana, both violate the Fourteenth Amendment of the Constitution of the United States, that still would not vest jurisdiction in this Court in this cause.

Both Article 665 and Act 61 of 1904 were cited in support of the State Court's judgment but the most compelling authority cited was Article 16, Section 6 of the Louisiana Constitution of 1921 about which Appellants have made no previous plea of unconstitutionality although the original complaint or petition filed in the Court of original jurisdiction made special reference to this Constitutional provision.

Article 16 of the original petition or complaint invoked the provisions of Article 16, Section 6 of the Louisiana Constitution of 1921 in support of the Levee Board's application for injunction at the outset of this litigation when the petition alleged:

> "That in addition to the servitude that your petitioner has over lands necessary for the construction and maintenance of levees and levee drainage under Article 665 of the Civil Code and Article 16, Section 6 of the Constitution of 1921 your petitioner, as well as all levee Boards in the State of Louisiana, has control over all natural drainage channels within the limits of its district and for a space of One Hundred (100) feet on each side thereof."

Reference to Article 31 of Appellants' answer to the original complaint or petition will readily disclose that special pleas were made with regard to Article 665 of the Revised Civil Code and Act 61 of the Louisiana Legislature of 1904 but no plea was made with respect to the provisions of Article 16, Section 6 of the Louisiana Constitution of 1921. The aforementioned Article 31 of Appellants' answer reads as follows:

> "Respondents aver that if Article 665, Revised Civil Code of Louisiana, or Act 61 of 1904, are interpreted to permit or held to authorize the "appropriation" attempted by petitioner, which is denied, then that said Act and said Codal provision violate the particular provision of the Constitution of the State of Louisiana and of the United States of America next above set out."

This in what the Louisiana Supreme Court had to say about the scope of Article 16, Section 6 of the Louisiana Constitution of 1921.

> "The defendants contend that the plaintiff has no authority in law to appropriate the property involved

in this suit. They take the position that the plaintiff can only obtain this property through expropriation proceedings. Their contention is based on their argument that Article 665, Revised Civil Code, and Section 6 of Article 16 of the Constitution do not grant the plaintiff authority to appropriate property not situated on navigable streams. They say that an interpretation of this Constitutional provision, when construed with a provision of a prior Constitution, Article 312 of the Constitution of 1898, demonstrates that this provision of the present Constitution deals only with the right of compensation. It is further argued that this provision of our Constitution does not extend the servitude granted under Article 665, R. C. C. to property not situated along navigable streams. To support their contention that the right of appropriation is governed by Article 665, R. C. C., they cite Dickson v. Board of Commissioners, supra. We have carefully examined the opinion in that case and find that it reviews the history of this article of the Civil Code and laws enacted to protect our state from flood waters. In view of the fact that the drainage of most of the Mississippi Valley flows through this State and the further fact that our state has many streams and natural drains, flood control is very vital to our welfare. Our lawmakers have been enacting, from time to time progressive measures to prevent and to minimize the damage caused by flood waters. Article 665, R. C. C. has been interpreted to apply not only to property actually adjoining the river edge but to all of that which is within range of the reasonable necessity of the situation as produced by the forces of nature unaided by artificial causes. Wolfe v. Hurley, 46 F. 2d 515, affirmed 283 U. S. 801, 75 L. Ed. 1423, 51 S. Ct. 493. While the issue presented in this case is different from that presented in the case of Dickson v. Board of Commissioners, supra, the reasons given for the decision and the statements made therein support the construction placed on this article of the Code by the federal court. A construction of this codal article so as to apply only to the

shores of navigable streams would be too narrow and defeat the purpose sought to be obtained. It would be useless to build a levee if it could not be protected. But be that as it may, when the codal article is construed with Act 61 of 1904 and Act 66 of 1942, it is apparent that the plaintiff had ample authority to appropriate this property. *Moreover, if there were any doubt as to the authority of the plaintiff to appropriate this land under the codal article and statutes, the plaintiff had ample authority under Section 6, Article 16 of the Constitution of this state which authorizes the appropriation of property used or destroyed for levee drainage purposes. What is necessary for levee drainage purposes is a question of fact and, as pointed out above, Levee Boards have the responsibility of providing sufficient levees and levee drainage to relieve the state from the hazards of flood waters.*" (Emphasis ours.)

Regardless, therefore, of what may be the case with respect to the statutory and codal provisions the Louisiana Courts would surely have reached the same result on the basis of the Constitutional provision alone. Inasmuch as no plea was ever made by the Appellants that the Constitutional provision is violative of the Fourteenth Amendment to the Constitution of the United States Appellants may not now be heard to invoke the jurisdiction of this Court for that purpose nor to urge that this Court rule on the statutory and codal provisions when such ruling would not alter the existing judgment in this cause.

We take it as too well settled to admit of argument or require citation that unconstitutionality is a special plea and cannot be raised in this Court for the first time, thus denying the Supreme Court of Louisiana the opportunity to have ruled on the point. We take it too that this Court requires no citation or authority for the proposition that jurisdiction will not be noted unless opportunity is afforded

to alter the judgment after consideration of a federal question. No federal question decisive of the affect of the existing judgment is presented by this appeal and it is submitted that same should be dismissed.

III

Appellants seek to invoke the jurisdiction of this Court on the basis that the final judgment of the Louisiana Supreme Court constitutes a taking of property without due process of law. Your Honors are reminded that this entire proceeding involved only an application for preliminary and permanent injunctions and at no time was the ownership of any property at issue in the litigation. It will be noted from the original petition or complaint of the Tensas Basin Levee Board that the injunctions were sought without regard to the ownership of property affected and surely the judgments rendered by both the trial Judge and the Supreme Court of Louisiana amply demonstrate that the right of the Levee Board to enjoin the practices of Appellants here was wholly without regard as to whether Appellants are the owners of any property. The Levee Board did not know then and does not know now in whom the ownership of the affected property is vested; the Levee Board does not care in whom the ownership may be vested. The position of the Levee Board, fully confirmed by the opinion and judgment of the Supreme Court of Louisiana, to put it simply, is that these Appellants were enjoined from the threatened use of arms against a contractor of the United States and this regardless of whether defendants or other parties may be the true owners of the land affected.

Inasmuch as Appellants seek this appeal solely on the basis that property is being taken without due process of law, we earnestly submit that Appellants have not shown

in the record that they are the owners of the property affected. Furthermore the record fails to disclose that any property is being taken with or without due process of law. The content of the judgment of injunction fails to recognize any ownership of any property; it simply enjoins Appellants from the threatened use of arms.

In view of the failure of the record to show and of the Louisiana Courts to find that Appellants are the owners of any property affected by the injunction, it is submitted that no question of the taking of property with or without due process of law has been or may now become involved in this litigation and that no federal question under the Fourteenth Amendment to the Constitution of the United States, exists in this cause.

IV

With respect to Act 61 of the Louisiana Legislature of 1904 we should like to correct any impression that the power conferred by that Statute is in any way related to eminent domain or expropriation. The exercise of the power granted by the Statute is in no way confiscatory, does not disturb nor change the ownership of the land, but simply provides for a reasonable exercise of the police power of the State, delegated by law to a political subdivision of the State. For this further reason it is urged that no federal question is involved in this cause.

WHEREFORE, the Board of Levee Commissioners of the Tensas Basin Levee District, Appellees herein, respectfully move that the appeal sought to be made by Appellants, George B. Franklin, Sr., et al. be dismissed for lack of a federal question vesting this Court with jurisdiction of this cause.

Appellees further pray for all orders necessary and for general and equitable relief.

(S.) C. C. Wood,
Attorney for Board of Levee Commissioners of the Tensas Basin Levee District, State of Louisiana,
P. O. Box 4155, Capitol Station,
Baton Rouge, Louisiana.

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Supreme Court of the United States

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No. 283

GEORGE B. FRANKLIN, SR., and GEORGE B. FRANKLIN, JR.,
Appellants,

versus

BOARD OF COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT, *Appellee.*

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL.

HECTOR G. SPAULDING,
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Supreme Court of the United States

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No. 283

GEORGE B. FRANKLIN, SR., and GEORGE B. FRANKLIN, JR., *Appellants,*

versus

BOARD OF COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT, *Appellee.*

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Appellants in the above entitled and numbered cause pray that this Court grant a Rehearing of its Order of October 15, 1951, granting the Motion to Dismiss Appellants' appeal.

REASONS FOR GRANTING REHEARING.

The per curiam opinion of this Court granting the motion to dismiss reads as follows:

> "*Per curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Eldridge v. Trezevant, 160 U. S. 452;

> Wolfe v. Hurley, 283 U. S. 801. Mr. Justice Minton took no part in the consideration or decision of this case."

It is submitted that the two cases cited therein are not decisive of the question involved in the present case. That question is: Under the Federal Constitution, can a state take private property 17 miles from the nearest navigable stream for public use without provision for a hearing of any kind and without adequate compensation?

This Court, in the *Eldridge* case, recognized the servitude attaching to property in Louisiana abutting on navigable streams. The opinion reads:

> "It is important, however, to observe the ground upon which the state legislative and judicial authorities base their action. That ground is found in the doctrine existing in the Territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation." (160 U. S. at p. 463)

The property involved in both the *Wolfe* and *Eldridge* cases was so situated and so used. In both cases, actual levee construction was undertaken, and in both cases the Court's opinions indicated specifically that the naturally encroaching course of the stream required levee protection. Neither of these factors exists in the present case. This Court, by indicating that the holdings in those two cases govern the present case, tacitly grants license to the State of Louisiana to appropriate rights in property not abutting on navigable streams and not used for levee construction or repair, without provision for hearing or adequate compensation. So to imply, the Court must either (1) have extended the servitude considered in the *Eldridge* and *Wolfe* cases so as to include all property whether or not abutting on navigable streams or (2) have found that

the State's general police powers authorize such a taking. We do not believe either of these conclusions to be the Court's intention. In fact, this Court in the *Eldridge* case, in distinguishing between property abutting on navigable streams and property otherwise situated, said as follows:

> "If . . . it were necessary to hold that the state . . . can take private property wherever situated, and apply it to any public purpose, . . . it is difficult to see how such a conclusion could be reached by the courts of a state in whose Constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made." (160 U. S. at p. 465)

We submit that this is exactly the situation presented in the instant case. In fact, Judge Hawthorne of the Supreme Court of Louisiana, recognizing the distinction, said in his dissent from the decision of that Court denying rehearing in the present case:

> "Under Article 665 a servitude is imposed on property *adjacent* to a navigable stream, and such property may be appropriated because in this state it has always been reserved to the public and is always acquired subject to the servitude. See Eldridge v. Trezevant et al., 160 U. S. 452, 16 S. Ct. 345, 40 L. Ed. 490. Can it be said that property situated 17 miles from a navigable stream is adjacent to it and subject to appropriation by the levee board for the purpose of digging a drainage canal for levee drainage?
>
> "If Article 16, Section 6, extended the servitude recognized in Article 665 of the Code, and the property in the instant case is burdened with such servitude (of this I have grave doubt), and the levee board has the right to appropriate it, then does our constitutional article violate the provision of the Fourteenth Amendment to the United States Constitution that no state shall deprive any person of property without due proc of law? Article 16, Section 6, of the Louisiana Constitution fixes the price for property actually used or destroyed for levees or levee drainage at the assessed valuation, but, as pointed out in Wolfe v. Hurley, 46 F.

2d 515, affirmed by the United States Supreme Court, the price so fixed is nothing but a gratuity because the state had a right to appropriate property adjacent to navigable streams without any compensation under Article 665. The assessed value certainly is not just and adequate compensation.

"The right of the levee board to *expropriate* the property to be used for the drainage canal is not questioned. The serious question here presented is whether the property because of its nature and location was acquired subject to the servitude imposed by Article 665. If so, the levee board may appropriate it without violating the provision of the United States Constitution.

"Since I consider that a serious federal constitutional question is involved, I am of the opinion that a rehearing should have been granted so that this court might give further consideration to the question." (— La. —, 54 So. (2d) 125 at p. 129).

The expropriation of which Judge Hawthorne speaks is the Louisiana procedure under the right of eminent domain. This procedure provides for condemnation only after hearing and provision for adequate compensation. The expropriation procedure was fully available to the State, and there is no apparent reason for its not having been utilized.

Instead, however, the State proceeded arbitrarily to confiscate the property rights under its asserted powers of appropriation. The property is 17 miles from the nearest navigable stream and accordingly could not be considered as abutting thereupon or within the range of reasonable necessities produced by natural causes, the outer limit established in the *Wolfe* case. The express purpose of the appropriation was not for levee construction or repair, but to provide the United States Government with rights of way in connection with a drainage project authorized by the Secretary of War. Clearly, the proposed construction of a drainage ditch on property many miles from a navigable stream does not constitute such property as abutting on a navigable stream and burden it with the servitude recognized in the *Eldridge* case as attaching to abutting property

for the specific and limited purpose of "making and repairing public levees," especially under the strict rule of construction applicable to real property servitudes.

This Court, by sanctioning arbitrary appropriation under these circumstances, is countenancing the use by the State of Louisiana of a grossly unjust and confiscatory procedure, when an appropriate means exists for the accomplishment of the same purpose under which Constitutional safeguards of due process are observed. Such a result, far from being in accord with the *Eldridge* and *Wolfe* decisions, is clearly contrary to the holdings of those cases, and extends the scope of the appropriation procedure far beyond its restricted purpose.

This Court recently had occasion to re-examine the importance of procedural due process in *Joint Anti-Fascist Refugee Committee* v. *McGrath et al.*, 341 U. S. 123, and as Mr. Justice Frankfurter stated in concurring:

> "It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights . . . Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated." (341 U. S. at p. 164)

The serious and far-reaching consequences of the per curiam opinion, in permitting a further expansion in the area of application of the appropriation procedure, which contravenes the standards of due process applied to the taking of property for public use, demonstrate the importance of a more thorough examination of the issue than that presented in the jurisdictional statement, the motion to dismiss, and the brief in opposition thereto, with their limited functions.

In the event the Court should deny re-hearing, it is respectfully submitted that the Court should, at the very least, modify its opinion to reaffirm the limitations in the application of the *Eldridge* and *Wolfe* decisions, in order that the implications of the present opinion should not place a cloud on the property rights of the thousands of other

owners of property in Louisiana not abutting on navigable streams which may as a result of this decision become subject to appropriation for drainage ditch and other purposes.

Respectfully submitted,

HECTOR G. SPAULDING,
WARREN HUNT,
JOHN C. MORRIS, JR.,
ALCIDE J. WEYSHAM,
Attorneys for Appellants.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

HECTOR G. SPAULDING,
Attorney for Appellants.

No. 283. FRANKLIN ET AL. *v.* BOARD OF COMMISSIONERS OF TENSAS BASIN LEVEE DISTRICT. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Eldridge* v. *Trezevant*, 160 U. S. 452; *Wolfe* v. *Hurley*, 283 U. S. 801. MR. JUSTICE MINTON took no part in the consideration or decision

of this case. *Hector G. Spaulding* for appellants. *C. C. Wood* for appellee. Reported below: 219 La. 859, 54 So. 2d 125.